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In The

Supreme Court of the United States

October Term 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE S. FLOTT,

Petitioners,

v.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR and J. JERRY SHIELDS,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

MOTION OF THE AMERICAN PLANNING ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN PLANNING ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Planning Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner's writ of certiorari in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

The interest of the American Planning Association arises from its basic organizational purpose which is to foster and encourage the use of sound comprehensive land use planning principles by governmental bodies.

As the nation's largest non-profit association of 28,000 professional urban and regional planners, appointed and elected lay planning officials and other interested citizens, the American Planning Association (APA) monitors planning practices throughout the United States. APA promotes the use of sound, rational and non-discriminatory zoning and planning practices through its Planning Advisory Service (PAS) inquiry answering service, reports and memos; its magazines, newsletters, conferences, continuing education workshops, and its participation as an *amicus curiae* before state and federal courts.

APA has long furnished an expert and balanced perspective on the relationship or nexus between planning and zoning. It has produced several PAS Reports and Memos on this topic as well as many articles, workshops and conference sessions. The nexus between zoning and planning is one of the most frequent and long-standing inquiries local governments have submitted to APA's PAS inquiry answering service. APA has consistently taken the position that a comprehensive planning process is an indispensable precursor to the adoption of a zoning ordinance.

In the instant case in the Missouri Court of Appeals, Western District, respondents argued that a local governmental unit could impose a land use regulatory scheme initially adopted forty years ago without engaging in any planning whatsoever. It concluded that the zoning ordinance bore a substantial relationship to public health, safety, morals or general welfare and thus did not violate the substantive due process rights of the landowners notwithstanding the total absence of any plan, planning process or procedure. The American Planning Association believes that the constitutional issue inherent in the planning/zoning relationship will impact communities

nationwide should the Missouri Court of Appeals' decision be allowed to stand. The national community of state, city and county planners and planning officials will be affected by this decision. Because of the importance of the holding and the American Planning Association's unique status as the major professional organization representing the interests of planners and state and regional local governmental planning departments and commissions, it is believed that the brief which *amicus curiae* is requesting permission to file will show the vital national importance of this constitutional issue.

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the United States Constitution, amendment XIV, requires that before a local governmental body may impose a restrictive zoning ordinance on property owners it must engage in some type of planning process or procedure that creates the rational basis necessary to avoid an arbitrary, capricious and unreasonable exercise of the police power.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTEREST OF THE AMICUS CURIAE 2

REASONS FOR GRANTING THE PETITION 3

I. The Missouri Court of Appeals decision by totally divorcing the zoning and planning processes condones a violation of the Petitioners' substantive due process rights to own property interests free of arbitrary, capricious, and unreasonable exercises of the police power... 4

II. The Question Presented Is of National Importance 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4

Amcon Corp. v. City of Eagan, 348 N.W.2d 66 (Minn. 1984) 9

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) 5

Conniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) 4

Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) 9, 10

East Lands, Inc. v. Floyd County, 262 S.E.2d 51 (Ga. 1979) 8

First Hartford Realty Corp. v. Planning & Zoning Comm'n of Bloomfield, 338 A.2d 490 (Conn. 1973) 8

Green v. County Council of Sussex, 508 A.2d 882 (Del. Ch. 1986), *aff'd*, 516 A.2d 480 (Del. 1986) 6

Haines v. City of Phoenix, 727 P.2d 339 (Ariz. App. 1986) 8

Kozesnik v. Montgomery Twp., 131 A.2d 1 (N.J. 1957) 7

Levine v. Oyster Bay, 259 N.Y.S.2d 247 (Sup.Ct. 1964), *aff'd*, 283 N.Y.S.2d 171 (2d Dept. 1966) 8

Levitz v. State, 613 P.2d 1259 (Ariz. 1980) 8

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) 9

Mahaffey v. Forsyth County, 394 S.E.2d 203 (N.C.App.), *review dism'd*, 399 S.E.2d 327 (N.C. 1990), *aff'd*, 401 S.E.2d 365 (N.C. 1991) 9

Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989) 4

TABLE OF AUTHORITIES – Continued

Page

Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex.App. 1989), *cert. denied*, 498 U.S. 1087 (1991) 9

Moore v. City of East Cleveland, 431 U.S. 494 (1977) ...3, 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 9

Nova Horizon, Inc. v. City Council, 769 P.2d 721 (Nev. 1989) 9

O'Loane v. O'Rourke, 42 Cal.Rptr. 285 (Cal.App. 1965) 7

Palatine National Bank v. Village of Barrington, 532 N.E.2d 955 (Ill.App. 1988) 9

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 4

Udell v. Haas, 235 N.E.2d 897 (N.Y.Ct.App. 1968) 6

Vickers v. Township Committee of Gloucester Township, 181 A.2d 129 (N.J. 1962), *app. dism'd*, 371 U.S. 233 (1963), *overruled, Southern Burlington N.A.A.C.P. v. Township of Mount Laurel*, 456 A.2d 390 (1983) 7

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)..... 4

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 3, 4

Wilson v. Borough of Mountainside, 201 A.2d 540 (N.J. 1964)..... 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 1

STATUTES

Mo.Rev.Stat. § 89.040 ..... 2, 5

OTHER AUTHORITIES

1 Norman Williams, American Land Planning Law 104-118 (1988) 7

Charles L. Siemon, *The Paradox of "In Accordance With A Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Land Use Regulations,* 16 Stetson L.Rev. 603 (1987) 9

The American Planning Association respectfully submits this brief in support of the Petitioner's petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District is reported at 886 S.W.2d 74 (1994). The Missouri Court of Appeals, Western District denied Petitioner's Motion for Rehearing and Motion for Transfer to the Supreme Court of Missouri on October 4, 1994. The Missouri Supreme Court denied Petitioners' application for transfer on December 22, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in relevant part:

U.S. Const. amend. XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Village exercises its power to zone pursuant to, in part, Mo.Rev.Stat. § 89.040:

> 89.040. Purposes of regulations
>
> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

INTEREST OF THE AMICUS CURIAE

Without repeating the material contained in the Motion for Leave to File Brief Amicus Curiae, the American Planning Association (APA) respectfully submits that it has a vital interest in the outcome of the petitioner's petition for a writ of certiorari. It is the leading national professional organization whose members are on the front line of planning and zoning throughout the United States. It is also a unique organization in that its members include not only professional planners, both private and public, but lay appointed and elected individuals who

serve on thousands of state, regional and local governmental organizations which develop, implement and enforce land use regulatory programs throughout the United States. The APA, through its Amicus Curiae Committee, carefully considers which cases are important enough to its members to merit an amicus curiae brief. A primary APA objective, which is threatened by the Missouri Court of Appeals decision, is to foster sound state, regional and local governmental planning efforts and to tie those planning efforts to the unit's land use regulatory mechanisms.

REASONS FOR GRANTING THE PETITION

Property owners in the United States have a constitutional right protected by the 14th Amendment from having their property interests subjected to police power regulations that are not "shown to have any 'substantial relation to the public health, safety, morals or general welfare . . . ' " *Moore v. City of East Cleveland*, 431 U.S. 494, 520 (1977) (Stevens, J. concurring). The exact parameters of that constitutional protection are hard to define. But in a similar facial constitutional attack on a zoning ordinance, this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), distinctly recognized that if the property owner could prove that the zoning ordinance was "clearly arbitrary or unreasonable, having no substantial relation to the public health, safety, morals, or general

welfare," *Id.* at 395, a substantive due process claim would be proven.[1]

I. The Missouri Court of Appeals decision by totally divorcing the zoning and planning processes condones a violation of the Petitioners' substantive due process rights to own property interests free of arbitrary, capricious, and unreasonable exercises of the police power.

Beginning with this Court's initial validation of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926), followed by the widespread adoption of the Standard Zoning Enabling Act's language requiring that zoning be "in accordance with a comprehensive plan," and continuing through more recent Supreme Court land use decisions, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the notion that a property owner's substantive due process rights are violated when a state, regional or local governmental unit exercises its land use powers in an irrational or arbitrary manner has been widely accepted. See also, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992); *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th

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[1] Judge Posner has called the substantive due process principle "a tenacious but embattled concept." *Conniston Corp. v. Village of Hoffman Estates*, 844 F.2d. 461, 465 (7th Cir. 1988). Nonetheless, he applied the principle in a challenge to a land use decision because, among other reasons, this Court had done so in the landmark zoning decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Cir. 1989); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

The exercise of the zoning power without evidence of any planning or forethought is arbitrary. Planning and zoning, in other words are inextricably linked. The New York Court of Appeals recognized the importance of the relationship between planning and zoning that was incorporated into the "in accordance with the comprehensive plan" language that was part of the Department of Commerce's Standard Zoning Enabling Act (SZEA). The SZEA became the benchmark for state enabling legislation throughout the United States and with some minor amendments is still very evident in the Missouri statute at issue here. Mo.Rev.Stat. § 89.040. The SZEA language requiring the zoning ordinance to be in accordance with the comprehensive plan is the statutory recognition of the substantive due process principle that a property owner has a right to be free of arbitrary exercises of the police power. The New York court concluded:

> Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> This fundamental conception of zoning has been present from its inception. The universal statutory requirement that zoning conform to a 'well-considered plan' or 'comprehensive plan' is a reflection of that view. . . . The thought behind the requirement is that consideration must be

> given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community.

Udell v. Haas, 235 N.E.2d 897, 900 (N.Y.Ct.App. 1968) (citations omitted).

The record in this case indicates that the Village of Oakwood, Missouri adopted Ordinance No. 10 in March 1955 (which incorporated without change a 1930's subdivision plat). The ordinance, with only minor non-substantive changes, has remained in effect since that date. The effect of the ordinance is to restrict all 80 lots located within the Village to exclusive large lot single-family residential use with a minimum lot size of 30,000 square feet. The Village has never adopted a comprehensive plan nor engaged in any "calm and deliberate" consideration of the alternatives in any plan or planning process. Professional planners are not necessary, but planning is. There ought to be a process that reflects forethought. The size and location of the local governmental entity will dictate what is needed in a given case, but a government ought to "think before it acts."

The Standard Zoning Enabling Act language requiring that zoning be "in accordance with a comprehensive plan" was perceived by a Delaware court to "derive[s] in part at least from the constitutional obligation that the police power not be exercised arbitrarily." *Green v. County Council of Sussex County*, 508 A.2d 882, 889 (Del.Ch. 1986), aff'd, 516 A.2d 480 (Del. 1986). It is the planning process

which provides the necessary safeguards against arbitrary and irrational police power actions that deprive a person of his or her substantive due process rights.

Historically the recognition that the planning provision of the Standard Zoning Enabling Act language reflects a constitutional imperative has been slow in coming. Interpretation in the state courts of the statutory planning requirements to validate zoning has reflected changing judicial attitudes toward land use regulation, which have become increasingly recognized during recent decades. The 1950s, when zoning law was still fairly new, was a period of maximum judicial respect for unplanned municipal autonomy and home rule; the state courts, led by New Jersey and California, made a conscious decision to give local governments great freedom in guiding their own future.[2] Under this philosophy, it was perhaps natural to downplay any requirement that zoning must be in accordance with a plan or result from a planning process. Courts were simply unwilling to overturn local zoning efforts even though they were totally unsupported by separate plans or planning processes.[3]

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[2] *See Kozesnik v. Montgomery Twp.*, 131 A.2d 1 (N.J. 1957); *Vickers v. Township Committee of Gloucester Twp.*, 181 A.2d 129, 140 (1962), *app. dism'd*, 371 U.S. 233 (1963), *both overruled, Southern Burlington N.A.A.C.P v. Township of Mount Laurel*, 456 A.2d 390 (1983); *O'Loane v. O'Rourke*, 42 Cal.Rptr. 285 (Cal.App. 1965). See generally, 1 Norman Williams, American Land Planning Law 104-15 (1988).

[3] It is this outmoded 1955 New Jersey decision. *Kozesnik, supra*, overruled in the *Mount Laurel* case which the Missouri Court of Appeals placed its greatest reliance upon as expressing the current constitutional requirements for land use regulations.

While there were many interpretations of the SZEA's requirement of "in accordance with the comprehensive plan," the most common interpretation in the state courts in effect read the requirement out of the Act, by holding that the required plan could be found in the zoning ordinance, if one only looked hard enough.[4]

However, the years since 1970 have seen a striking change in judicial attitudes toward land use regulation. As the 1960s proceeded, it became more evident that even well-meaning local governments were misusing the freedom granted by the courts; their decisions were sometimes arbitrary as to property owners, often exclusionary as to large groups in the local and regional population, and many times just plain non-sensical. As a result, in recent years there has been a marked change toward a more activist judicial review in the state courts; now the courts know what is going on – if there is a valid explanation usually supported by a comprehensive plan or planning process, the regulation is upheld.[5] As one noted land use lawyer has stated:

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[4] The resulting interpretation was in fact rather silly - that the zoning ordinance must be in accordance with itself. As one New York court stated: "This court cannot believe that the Legislature intended to contemplate such a meaningless interpretation of these provisions." *Levine v. Oyster Bay*, 259 N.Y.S.2d 247, 254 (Sup.Ct.), *aff'd*, 283 N.Y.S.2d 171 (2d Dept. 1966). Nonetheless this was the most common interpretation in the pre-1970 state law.

[5] *See, e.g., Levitz v. State*, 613 P.2d 1259 (Ariz. 1980); *Haines v. City of Phoenix*, 727 P.2d 339, 344 (Ariz.App. 1986); *First Hartford Realty Corp. v. Planning & Zoning Comm'n of Bloomfield*, 338 A.2d 490 (Conn. 1973); *East Lands, Inc. v. Floyd County*, 262 S.E.2d 51

> Planning and comprehensive plans provide substantive integrity to land use regulations: 'If American land use controls are to work effectively and fairly, they must be based upon (a) an overall understanding of the needs for land in the community, and (b) a sense of direction – that is to say, upon planning . . . '

Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 Stetson L.Rev. 603, 626-27 (1987). Post hoc rationalizations should not be the basis for a zoning ordinance. Judicial review of zoning decisions would be made much easier if the zoning ordinance was based on a comprehensive planning process, rather than the ad hoc and post hoc rationalizations, that are typified by the Village's position in this case.

This Court in its recent land use cases, *Nolan v. California Coastal Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), and *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), has developed principles which are equally applicable in the substantive due process arena. *Dolan* and *Lucas* embody the principle that the government must tell property owners why they are being regulated. In *Nollan*, the

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(Ga. 1979); *Palatine National Bank v. Village of Barrington*, 532 N.E.2d 955 (Ill.App. 1988); *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984); *Nova Horizon, Inc. v. City Council*, 769 P.2d 721 (Nev. 1989); *Mahaffey v. Forsyth County*, 394 S.E.2d 203 (N.C.App.), *review dism'd*, 399 S.E.2d 327 (N.C. 1990), *aff'd*, 401 S.E.2d 365 (N.C. 1991); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex.App. 1989), *cert. denied*, 498 U.S. 1087 (1990).

Court invalidated a regulatory land use dedication which lacked a rational nexus in failing to advance a legitimate state interest. Similarly in *Lucas*, the state's reasons for preventing construction on the beachfront lot were found inadequate where a total economic loss ensued. It was not clear why Lucas could not build on his lots when his neighbors had built on theirs. In *Dolan*, the city's reasons for demanding a bike path and a greenway easement were likewise insufficient. The city had to show that the property owner's proposed actions justified its demands.

Though the explanations for the exercise of the police power in *Dolan* and *Lucas* were insufficient, they are significantly more than provided here, where the Village has restricted land use without any effort to tell property owners why they are being limited in what they can do. The mere enactment of a zoning ordinance is an insufficient explanation.

This Court has also warned that express statements made by local governmental units to justify a mandatory dedication of land in exchange for a land use permit might not be sufficient without appropriate study of planning to sustain the local government's burden of proof to show the 'rough proportionality' constitutionally required before such a dedication may be imposed. *Dolan*, 114 S.Ct. at 2321-22. Requiring the City of Tigard to quantify its findings in support of its mandatory dedication requirements cannot compare with the record in this case which shows a total absence of any municipal planning efforts or findings regarding the initial adoption and continued application of its zoning ordinance. The Missouri Court of Appeals simply inferred or "divined" a municipal purpose. There appears to be no evidence in

the record to support the continued application of a forty year old single use zoning ordinance adopted without support of a plan or a planning process when there has been a substantial change in the physical environs of the Village, and the record shows that not one residential building permit has been granted for over 12 years for miles along the exclusively commercial thoroughfare.

There are numerous factors which a planning process would have analyzed in dealing with the petitioner's request to rezone which were ignored by the Village. There is no evidence in the record to show that the Village looked at the experience of other local governments in the Kansas City metropolitan area, or nationally, in dealing with residential zoning that abuts major commercial highways. The Village did not determine what, if any, was the extent of depreciation of the property values of the residentially-zoned lands now adjoining this major thoroughfare. Likewise, nothing in the record shows that the Village considered any special need for housing in the area abutting the highway in the context of metropolitan travel-to-work patterns. Planning would also analyze the needs in light of the surrounding commercial development and the incompatibility of single family residential development along a major highway.[6]

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[6] The renowned Judge Hall of the New Jersey Supreme Court noted the complexities involved in zoning lands adjacent to highways in *Wilson v. Borough of Mountainside,* 201 A.2d 540 (N.J. 1964). In discussing a zoning ordinance that zoned land for residential use along a major thoroughfare Judge Hall concluded in light of the requirement that the zoning be in accordance with a comprehensive plan that: "It [the blanket residential zoning district] is the antithesis of the statutory

The facts in this case show the need to tie the zoning ordinance to a plan or planning process. The now forty year old restrictive large lot zoning ordinance restricts the petitioners' parcel to single family residential use. The parcel now abuts a six lane highway which carries upwards of 25,000 cars per day. Land abutting that highway outside of the Village limits, but adjacent to the parcel owned by the petitioners, has been devoted to commercial uses including an automobile muffler shop, an automobile parts store, gasoline service stations, a large automobile dealership and several office buildings. A decision to restrict the use of petitioners' land to residential purposes without any supporting planning process, taking into consideration the present and future conditions of the area in which the property is located, is a deprivation of their property rights without due process of law.

II. The Question Presented is Important

The relationship between planning and zoning is the cornerstone of the public right to regulate land use for the protection of the public health, safety and general welfare. The American Planning Association fosters a close relationship between the planning process and the zoning process. Only through that nexus can private

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requirement (SZEA) to impose blanket use restrictions without regard to the character of the district and use suitability . . . " 201 A.2d at 548. He further added that even where a zoning district was in accordance with a comprehensive plan, the plan must not be a capricious one which is realistically unreasonable. *Id.* at 552.

landowners be assured that the governmental entity is acting in a reasonable and non-arbitrary manner. The Missouri Court of Appeals decision, if allowed to stand, will have a deleterious national impact by discouraging planning efforts and encouraging the imposition of arbitrary zoning regulations.

Property owners have a right to be free of arbitrary governmental zoning regulation. Before zoning regulations are imposed that diminish the value of property owners in the community, planning must occur. The drafters of the Standard Zoning Enabling Act envisioned that zoning ordinances would be adopted "in accordance with a comprehensive plan." The APA believes that zoning without any planning process leads to results such as we have here where a zoning ordinance, in effect for over forty years without significant change, arbitrarily restricts the use of petitioners' land. The issue of zoning land abutting major highways for residential use arises throughout the United States. There are no simple answers to the many questions involved in that type of zoning restriction, but it is clear that some type of planning effort must be utilized because of the many complex factors involved. Zoning without planning should be treated as a *per se* violation of a property owner's due process right to be free of arbitrary, capricious and irrational zoning regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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